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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 334

ROBERT E. BOEHKER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. _____.

ROBERT E. BOENKER,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio, entered in this cause of April 16, 1969, affirming his conviction of second degree manslaughter.

CITATIONS TO OPINIONS BELOW.

The memorandum opinion of the Court of Appeals of the Eighth Judicial District of Ohio (Cuyahoga County) is unreported and is printed in the Appendix, *infra,* pp. 9-12.

An appeal was attempted to the Supreme Court of the State of Ohio, said appeal was dismissed sua sponte on March 12, 1969. A copy of that order is printed in the Appendix, *infra,* p. 12.

JURISDICTION.

A motion for rehearing on the dismissal of appeal was duly filed, but denied by the Supreme Court of the State of Ohio on April 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) since rights, privileges and immunities under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

I. Where a written statement made by the accused is elicited after probable cause for arrest existed even though there is no formal arrest and prior to the delineation of safeguards to the accused, should such statement be suppressed in State Criminal proceedings as violative of the Fifth and Fourteenth Amendments to the United States Constitution?

II. Where the trial court charges a jury regarding an offense not mentioned in either the original indictment or subsequent Bill of Particulars should such charge be found to be reversible error in State criminal proceedings as violative of the Sixth and Fourteenth Amendments to the United States Constitution?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Constitution of the United States.

Amendment XIV, Section 1, Clause 2:

> * * * nor shall any state deprive any person of life, liberty, or property without due process of law: * * *

Fifth Amendment to the Constitution of the United States (Rights of Persons):

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment to the Constitution of the United States (Rights of Accused):

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Ohio Constitution—Article I—Section 10.

> Except in cases of impeachment, cases arising in the army and navy, or in the militia, when in actual service in time of war or public danger, and cases involving offenses for which the penalty provided is less than imprisonment in the penitentiary, no person shall be held to answer for a capital, or otherwise infamous, crime, unless on presentment or indictment of a grand jury; and the number of persons necessary to constitute such grand jury and the number thereof necessary to concur in finding such indictment shall be determined by law. In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to accused means and the opportunity to be present in person and with counsel at the taking of

such deposition, and to examine the witness face to face as fully and in the same manner as if in court. No person shall be compelled, in any criminal case, to be a witness against himself; but his failure to testify may be considered by the court and jury and may be made the subject of comment by counsel. No person shall be twice put in jeopardy for the same offense.

The full text of each of Ohio Revised Code Sections is reprinted in Appendix, *infra*, pp. 12-13.

STATEMENT.

Petitioner was indicted, tried and convicted of second degree manslaughter (traffic manslaughter) pursuant to Ohio Revised Code Section 4511.18 in the Common Pleas Court of Cuyahoga County.

At the commencement of the trial, it was stipulated by both prosecution and defense counsel that the victim, one John Perry Papp, age 6, died as the result of an automobile pedestrian collision in Lakewood, Ohio, at or about 6:30 P.M., February 18, 1966; the automobile was driven by petitioner.

The prosecution's evidence included testimony by the officer investigating the accident as to what the petitioner said when the officer asked him what happened and the statement that the petitioner wrote out in the police cruiser a few moments afterwards. Before the actual trial, the court conducted a hearing on the motion by petitioner to suppress all written and oral statements given by the petitioner to the police. The trial court overruled the petitioner's motion as to the oral and written statements made by him at the scene, holding that the statements come within the lawful and admissible scope and field of interrogation. A written statement made by petitioner at

the Lakewood, Ohio police station the following day was not admissible according to the trial court.

In the trial court's charge to the jury, the court gave to the jury law which was not included in the State's Bill of Particulars. (The series of motions and responses thereto on bills of particulars are found in the appendix, pp. 14-17.)

REASONS FOR GRANTING WRIT.

I. STATEMENTS TAKEN WITHOUT DUE WARNING OF CONSTITUTIONAL GUARANTEES VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS.

Petitioner stands convicted of traffic manslaughter under Ohio Revised Code Sections 4511.20, 4511.21 and 4511.46. Petitioner stands convicted due to the use of statements which were given prior to his being informed of his right to the assistance of counsel and the right not to be compelled to be a witness against himself. It is axiomatic under our system of criminal jurisprudence that an accusatorial system is one in which the prosecution must establish a defendant's guilt by evidence not by coercive statements.

This Court has established judicious rules whereby a pre-trial statement given by accused can not be used against him if he has not first been advised of his right to counsel, retained or appointed, that he has an absolute right to remain silent and that anything he says may be used against him. *Escobedo v. Illinois*, 378 U. S. 478 (1964); *Miranda v. Arizona*, 384 U. S. 436 (1966).

Miranda describes custodial interrogation as questioning initiated by the police after the accused has been taken into custody or otherwise deprived of his freedom of action.

When custodial interrogation begins must be determined by the facts in each case. In order to effectuate the police of *Miranda,* the Court must, as dictated by the *Escobedo* case, provide assistance to the accused at "the critical stage." The Court in *Miranda* incorporated this philosophy in its decision. The critical stage has been declared to be that point "where the police officer during his investigation has enough information for probable cause to arrest." *State v. Taylor,* 437 P. 2d 853 (1964). It is at this point that the officers' solicitations turn from a general inquiry into an unsolved crime, to an elicitation of evidence to secure a conviction. *State v. Intogna,* 419 P. 2d 59 (1962); *State v. Tellez,* 431 P. 2d 691 (1966).

In the case at bar the officer knew the defendant was driving the automobile and had enough evidence to arrest the defendant. Yet he continued his questioning. This questioning was not in the furtherance of a general inquiry into an unsolved crime. The focus was now on the accused and the questioning was to elicit evidence.

The philosophy of the *Miranda* decision to prohibit inherently coercive questioning would be circumvented if the police were allowed to substitute the secluded patrol car for the stationhouse. Formal arrest is not the proper point to attach the *Miranda* warnings. If this were so the police would circumvent *Miranda* by delaying the "formal" arrest.

It is contended that the focus in this case was on the accused, he was not given his constitutional rights, and the defendant was denied a fair trial because of the use of coerced statements. This Court must determine the controversial issue of when custodial interrogation attaches.

II. PETITIONER'S CONVICTION ON CHARGES NOT INCLUDED IN THE INDICTMENT VIOLATES THE SIXTH AND FOURTEENTH AMENDMENTS.

It is provided in the Constitution, Ohio Constitution Article I, Section 10, United States Constitution, Sixth Amendment, that the accused is guaranteed the right to be apprised of the exact charge or charges against him. Traditionally this was accomplished by service of notice of the indictment.

The prosecution is limited in its proof to the crime charged in the indictment as made definite in the Bill of Particulars.

The indictment in this case merely charged that the defendant, on or about February 18, 1966, unintentionally and unlawfully killed John Perry Papp while engaged in the violation of State Traffic Law R.C. 4511.20, R.C. 4511.21, R.C. 4511.46. Counsel for defense requested and was granted a Bill of Particulars. In the Amended Bill of Particulars, the prosecuting attorney specifically stated that the charge against the defendant was limited to the issue of excessive speed and to that portion of R.C. 4511.21 dealing with speed limits. No mention was made of the assured clear distance during the trial. Although timely objection was made by defense counsel the court below charged the jury that:

> "Section 4511.21 which I referred to which is the unlawful operation which the state has charged, refers generally to assured clear distance and speed limits.
>
> This is the particular reference to assured clear distance: 'No motorist shall operate a vehicle at a greater speed than will permit him to bring it to a complete stop within the assured clear distance between the car he is operating and a visible object in its path of travel.'

> As the motorist proceeds, the assured clear distance constantly changes. It is measured at any moment by the distance between the motorist's car and the visible object ahead in the same lane in which the motorist is proceeding."

Because of this charge the State was allowed to establish its case against the defendant by proving an offense which the defendant was never confronted with. The State is limited in its proof to what is specified in the indictment and made definite by the Bill of Particulars; petitioner's conviction is based upon proof not elicited in the indictment.

CONCLUSION.

This case arises out of ugly beginnings,—a brutal death of a six year old pedestrian. However it is such cases as this that constitutional protections must be interposed.

The State of Ohio, through its judicial processes, has sanctioned the conviction of petitioner without delving into important constitutional problems. Grant of certiorari in the instant case will give this Court an opportunity to further delineate the moment when constitutional warnings must be given to an accused and restrictions as to proof to convict.

For the foregoing reasons, this petition for a writ of certiorari shall be granted.

Respectfully submitted,

HARVEY H. STARKOFF,
Counsel for Petitioner.

APPENDIX.

MEMORANDUM TO LAWYERS, COURT OF APPEALS OF CUYAHOGA COUNTY.

(October 31, 1968.)

This appeal was brought to this court by the defendant, Robert E. Boenker, following his conviction for second degree manslaughter in the Court of Common Pleas. The case arose out of an automobile-pedestrian accident in which the defendant, Robert E. Boenker, hit and killed John Perry Papp, a six year old pedestrian standing in an intersection in Lakewood.

The grand jury returned an indictment for second degree manslaughter, charging that the defendant violated Revised Code Section 4511.20, 4511.21 and 4511.46. Section 4511.20, Revised Code, pertains to the reckless operation of vehicles; Section 4511.46, Revised Code, pertains to the right of way of pedestrians crossing at a crosswalk. Section 4511.21, Revised Code, contains three sections; the first of which pertains to the reasonable and proper speed of an automobile in relation to the driving conditions; the second of which pertains to the speed that will allow stoppage within the assured clear distance ahead and the third sets the prima-facie speed limits for various traffic areas.

Following the indictment the defendant asked for and received a Bill of Particulars in which the prosecutor stated that at the time of the accident the defendant was driving "at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk * * *." The defendant then asked for a more complete Bill of Particulars, and the prosecution responded with essentially the same statement with the inclusion of the exact location of the accident. The de-

fendant again requested a more complete bill; however, this motion was denied by Judge McMahon.

The allegations arising from the indictment concerning violations of Section 4511.20, Revised Code, reckless driving, and Section 4511.46, Revised Code, right of way for a pedestrian, were dropped. Evidence was presented as to the location of the pedestrians at the time of impact and as to the speed that defendant had been driving. At the end of the trial, Judge Whiting charged the jury as to all three portions of Section 4511.21, Revised Code, including assured clear distance ahead.

Following the charge to the jury, the defendant took exception to that portion of the charge involving assured clear distance, contending that "the state is limited in its proof to what is specified in the indictment and made definite by the Bill of Particulars," and that since no mention of this portion of the statute was made in the indictment, or in the Bill of Particulars, or in the entire trial, the judge should have been precluded from charging the jury on it.

The essential issue of this appeal thus centers on whether or not the indictment as clarified by the Bills of Particulars did, as a matter of law, limit the state's case to the extent that the judge was prohibited from charging the jury on the assured clear distance ahead portion of Section 4511.21, Revised Code.

It is quite clear that the indictment alone made sufficient reference to the entire statute so that at no time during the trial would the state have gone outside the indictment in referring to either portion. The crux of the issue lies in whether or not the Bills of Particulars limited the indictment to only the first portion and third portion of the statute thus precluding the state from alluding to the second portion.

Two general principles that have been clearly established by the courts concerning Bills of Particulars are applicable to the instant case. It has been made clear by the courts that the function or purpose of a Bill of Particulars in criminal cases "is to furnish to the defendant further information respecting the charge stated in the indictment when necessary to the preparation of his defense, and to avoid prejudicial surprise at the trial." *United States v. U. S. Gypsum Co.*, D. C. Dist. Col. 37 F. Supp. 398 (1941). It is also clear that the state is confined at trial to the items listed in the Bill of Particulars. *State v. Bernstein*, 25 Ohio Law Abstract 291, 305; 8th Dist. Ct. of Appeals (1937); 71 *C.J.S.* 1096.

While in the instant case it is apparent that the defense counsel was surprised by and unprepared for Judge Whiting's charge on the assured clear distance ahead portion of the statute (R. 455), it also is clear that such surprise is not prejudicial error.

In view of the uncontested factual circumstances of this case, the first two portions of Section 4511.21, Revised Code, become so intimately interwoven that a charge of one necessarily involves a charge of the other whether specifically mentioned or not. Appellant treats assured clear distance as independent of speed; whereas it is apparent that speed is an integral factor of assured clear distance. Had the defendant been progressing at a reasonable and proper speed, he would have had time to stop before hitting John Papp. In the instant case in which the defendant hit a stationary, discernible object, the reference, a speed greater than was reasonable, automatically infers reference to that portion of the statute pertaining to the necessity of bringing a car to a halt before hitting such an object.

Thus the reference to excessive speed in the Bill of Particulars was sufficiently generalized so as not to significantly narrow the indictment and therefore not preclude a charge on assured clear distance. No error having been shown, the case is affirmed.

WASSERMAN, C.J., CORRIGAN, J., ARTL, J. concur.

MANDATE OF THE SUPREME COURT OF OHIO.

(March 12, 1969.)

To the Honorable Common Pleas Court
Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, no substantial constitutional question involved.

OHIO REVISED CODE.

Section 4511.18—Manslaughter in second degree.

No person shall unlawfully and unintentionally kill another while violating any law of this state applying to the use or regulation of traffic. Any person violating this section is guilty of manslaughter in the second degree.

Section 4511.21—Speed limits; modifications.

No person shall operate a motor vehicle, trackless trolley, or streetcar in and upon the streets and highways at a speed greater or less than is reasonable or proper, having due regard to the traffic, surface, and width of the street or highway and any other conditions, and no per-

son shall drive any motor vehicle, trackless trolley, or streetcar in and upon any street or highway at a greater speed than will permit him to bring it to a stop within the assured clear distance ahead.

Section 2941.07—Forms in charging offenses.

The following forms may be used in charging offenses: * * * Manslaughter. A.B. unlawfully killed C.D. * * *. Forms authorized by other sections of the Revised Code and other brief and comprehensive forms applicable to other offenses may also be used. The prosecuting attorney, if seasonably requested by the defendant, or upon order of the court, shall furnish a bill of particulars setting up specifically the nature of the offense charged.

INDICTMENT.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

Of the term of April, in the year of our Lord one thousand nine hundred and sixty six.

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio,

Do Find and Present, That Robert E. Boenker on or about the 18th day of February, 1966, at the County aforesaid, unlawfully and unintentionally killed John Perry Papp while engaged in the violation of a State Law applying to the use and regulations of traffic on, over or across the roads or highways.

Revised Code 4511.20
Revised Code 4511.21
Revised Code 4511.46

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION TO FURNISH BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a Bill of Particulars setting up specifically the nature of the offense charged for the reasons set forth in the Brief attached hereto, made a part hereof and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

(Filed June 14, 1966.)

Defendant's Motion for Bill of Particulars, is granted by the Court.

/s/ THOMAS J. PARRINO,
Judge.

BILL OF PARTICULARS.

Responding to the request of the defendant Robert E. Boenker for a Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above entitled case, the following:

That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION FOR MORE COMPLETE BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a more detailed and complete Bill of Particulars setting up more specifically the exact nature of the offense charged for the reasons set forth in the Brief attached hereto, made a part hereof, and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

Defendant's Motion for More Complete Bill of Particulars, is granted by the Court.

/s/ THOMAS J. PARRINO,
Judge.

AMENDED BILL OF PARTICULARS.

Responding to the request of the defendant for a more detailed Bill of Particulars, the Prosecuting Attorney says that the State of Ohio will prove on the trial of the above entitled case, the following:

That the defendant, on or about the 18th day of February, 1966, within Cuyahoga County, unlawfully and unintentionally killed John Perry Papp while operating a motor vehicle east on Madison Avenue at the intersection of Magee Street, at a speed greater than was reasonable or proper, and/or without due regard for the safety and rights of John Perry Papp who was lawfully crossing said roadway within a crosswalk;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

The Prosecuting Attorney says further that the allegation with reference to speed is a matter of evidence to be established under all the facts and circumstances which will be offered by the State on the trial of this case.

/s/ JOHN T. CORRIGAN,
Prosecuting Attorney.

MOTION FOR MORE COMPLETE BILL OF PARTICULARS.

Now comes the defendant and respectfully moves this Honorable Court for an order requiring the Prosecuting Attorney of Cuyahoga County, Ohio to furnish a more detailed and complete Bill of Particulars setting forth more specifically the rate of speed at which the defendant was allegedly operating his motor vehicle at the time of the alleged crime, the direction in which John Perry Papp was traveling at the time of the alleged crime and in what crosswalk he was in at said time for the reasons set forth in the Brief attached hereto, made a part hereof and marked Exhibit "A."

/s/ HARVEY H. STARKOFF,
Attorney for Defendant.

JOURNAL ENTRY.

(Filed September 22, 1966.)

This cause came to court this day for consideration of defendant's Motion for a more complete Bill of Particulars, and the same is overruled by the Court.

/s/ ROY F. MCMAHON,
Judge.